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Profession: A Definition

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PROFESSION: A DEFINITION

*Sande L. Buhai**

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INTRODUCTION

What is a “profession”? Is law a “profession”? And why might anyone care? The *Oxford English Dictionary* (OED) defines “profession” as “[a]n occupation in which a professed knowledge of some subject, field, or science is applied; a vocation or career, especially one that involves prolonged training and a formal qualification.”¹ Under the OED definition, chemistry is a “profession.” So is fashion design. That law is a “profession” under this definition is trivial: the practice of law requires prolonged training and a formal qualification; in the course of their practice, lawyers apply their knowledge of the law. But so what? When lawyers assert that law is a “profession” and not a business, they clearly mean something more.

Julius Henry Cohen begins his 1916 exploration of the question with a portrait of two lawyers discussing current cases.² On the surface, their conversation is concrete and focuses on detail. What is interesting to Cohen, however, is how the lawyers’ professional backgrounds and shared experiences shape their interchange.³ “[N]o other profession . . . furnishes so many opportunities for colloquial philosophizing and interchange of psychological information,” he asserts.⁴ He then contrasts the lawyers’ lively exchange with a

1. *Profession*, OXFORD ENGLISH DICTIONARY, <http://www.oed.com/view/Entry/152052> (last visited Jan. 8, 2013). The OED also tells us that in early use it was applied to the professions of law, the Church, and medicine, and sometimes extended also to the military profession. *Id.*

2. JULIUS HENRY COHEN, *THE LAW: BUSINESS OR PROFESSION?* xiii (1916).

3. *Id.*

4. *Id.*

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conversation about one of the same cases between a lawyer and a layman.⁵

The conversation between lawyer and layman is dull, strained, and requires much more explanation by the lawyer.⁶ Acknowledging the disparity of expertise, the layman poses Cohen's central questions:

Why should there be a class enjoying special privileges? Why should there be a group of men amenable to summary court process for professional misconduct? Why any standards of professional conduct? Why shouldn't anyone be permitted to draw up papers, appear in court—argue about facts? What is the *raison d'être* of the whole professional scheme? Why shouldn't lawyers advertise or solicit business, as business men do? Why shouldn't they pay 'commissions' for getting business?⁷

Norman Bowie's 1988 article collected others' attempts to provide a more meaningful definition. Abraham Flexner stated that for an occupation to be considered a profession it must:

(1) possess and draw upon a store of knowledge that was more than ordinarily complex; (2) secure a theoretical grasp of the phenomena with which it dealt; (3) apply its theoretical and complex knowledge to the practical solution of human and social problems; (4) strive to add to and improve its stock of knowledge; (5) pass on what it knew to novice generations not in a haphazard fashion but deliberately and formally; (6) establish criteria of admission, legitimate practice, and proper conduct; and (7) be imbued with an altruistic spirit.⁸

Walter Metzger argued that the "paramount function of professions . . . is to ease the problems caused by the relentless growth of knowledge."⁹

The Report of the Commission on Professionalism to the Board of Governors and the American Bar Association (ABA) House of Delegates adopted Roscoe Pound's lofty definition¹⁰: "a group . . . pursuing a learned art as a common calling in the spirit of public service—no less a public service because it may incidentally be a means of livelihood. Pursuit of the learned art in the spirit of a public

5. *Id.*

6. *Id.*

7. *Id.* at xiii–xiv.

8. Norman Bowie, *The Law: From a Profession to a Business*, 41 VAND. L. REV. 741, 743 (1988).

9. *Id.* at 743–44.

10. ABA Comm'n on Professionalism, ". . . In the Spirit of Public Service:" *A Blueprint for the Rekindling of Lawyer Professionalism*, 112 F.R.D. 243, 261 (1986).

service is the primary purpose.”¹¹ The Commission identified “the spirit of public service” as the “hallmark of the legal profession.”¹²

Some have attempted to articulate instead what a profession is *not*. In his lecture on professionalism, Judge Richard Posner states that the term “profession” does not include “business management and business generally, advertising, public relations, farming, politics, fiction writing, investment advice, the civil service, soldiering below the commissioned-officer level, entertainment, construction (other than architecture and engineering), police and detective work, computer programming, and most jobs in transportation.”¹³

Like Judge Posner, Norman Bowie agrees that business has not traditionally been referred to as a profession.¹⁴ He attributes this fact to businesses lacking the “altruistic spirit” inherent in a profession,¹⁵ echoing Flexner’s inclusion of “altruistic spirit” as a necessary part of professionalism.

Altruistic? Lawyers are professionals, not mere businessmen, because they are unusually altruistic? Who are we kidding? On this account, some lawyers may be “professionals,” but many, perhaps most, are not.

This Article will approach the same problem from a different direction: by exploring law, medicine, and accounting—all commonly viewed as “professions”—and attempting to identify their common characteristics. Each involves provision of a personal service, not a good. Each requires specialized education and the exercise of independent judgment, even if the service provider is technically an employee. Each typically involves substantial information disparities between provider and recipient. Trust of the service provider on the part of both the recipient and the public is therefore essential to each. Each therefore requires that the service provider put someone else’s interests ahead of his own and perhaps his employer’s, although the law does not always frame this requirement in standard fiduciary terms. Each therefore requires an occupational ethos different from business’s standard profit maximization norm. Maintenance of such an ethos may require internalized codes of conduct, occupational self-regulation, and/or an explicit disavowal of profit maximization as the

11. *Id.* (quoting ROSCOE POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES* 5 (1953)).

12. *Id.*

13. Richard A. Posner, *Professionalisms*, 40 *ARIZ. L. REV.* 1, 2 (1998).

14. Bowie, *supra* note 8, at 745.

15. *Id.*

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be-all and end-all. Finally, each profession discussed has duties to the public in addition to their individual clients. This Article looks both at national standards and then uses California as an example of state standards.

Why does this matter? It has become common to assert that voluntary contractual profit-maximizing exchanges produce the best of all possible worlds. But the image of a lawyer, doctor, or accountant contracting without legal or ethical restraint with client or patient to maximize profits is unsettling, at best. The psychological and institutional constraints required to make trust possible, and thereby make effective service possible, are complex. “Profession” and “professionalism” can only be fully understood within the context of such constraints.

I. PROVISION OF PERSONAL SERVICES

It appears obvious that all the professions are engaged in the provision of services, not the sale of goods. Although this is clearly a common characteristic, not much else needs to be said.

II. SPECIALIZED EDUCATION AND INDEPENDENT JUDGMENT

Each of these professions requires specialized education. As discussed below, this requirement is inextricably intertwined with many of the other characteristics, especially that of the requirement that these professionals use their best independent judgment.

A. Specialized Education

1. Law

The first ABA “Committee on Legal Education and Admissions to the Bar” was formed in 1879 and began focusing on the quality of institutions offering legal education and the requirements for bar admissions in various states.¹⁶ By 1893, the ABA organized “Section of Legal Education” to focus on regulating legal institutions and to combat ignorance within the profession.¹⁷

According to Cohen, in 1893, “at least half of the men in training for the American Bar were not attending any law school, but were getting their legal education entirely from private study or in private

16. Cohen, *supra* note 2, at 114–24.

17. *Id.* at 125.

offices.”¹⁸ However, at the time Cohen wrote his book, he stated that 150 law schools existed in the United States that catered to over 20,000 students.¹⁹ Cohen quotes Justice Brewer who said that “[t]he door of admission to the Bar must swing on reluctant hinges, and only he be permitted to pass through who has by continued and patient study fitted himself for the work of a safe counsellor and the place of a leader.”²⁰

Legal education today for most lawyers begins with admission to one of the almost 200 law schools in the United States.²¹ The law school applicant must have at least a bachelor’s degree and must complete the Law School Admission Test (LSAT) to apply to an accredited law school.²² According to the Law School Admission Council (LSAC) the LSAT is designed to measure a student’s ability to succeed in law school by testing “the reading and comprehension of complex texts with accuracy and insight; the organization and management of information and the ability to draw reasonable inferences from it; the ability to think critically; and the analysis and evaluation of the reasoning and arguments of others.”²³

Once the student has completed the LSAT, then he or she will apply to law school. There are ABA-approved law schools and non-ABA approved law schools—only approved law schools automatically satisfy the “legal education requirements that a person must meet to be eligible to sit for the bar examination.”²⁴

18. *Id.* at 137

19. *Id.*

20. *Id.*

21. *ABA-Approved Law Schools*, A.B.A., http://www.americanbar.org/groups/legal_education/resources/aba_approved_law_schools.html (last visited Jan. 8, 2013).

22. *About LSAC*, LAW SCH. ADMISSION COUNCIL, <http://www.lsac.org/aboutlsac/about-lsac.asp#lsat> (last visited Jan. 8, 2013).

23. *About the LSAT*, LAW SCH. ADMISSION COUNCIL, <http://www.lsac.org/JD/LSAT/about-the-LSAT.asp> (last visited Jan. 8, 2013).

24. *Frequently Asked Questions*, A.B.A., http://www.americanbar.org/groups/legal_education/resources/frequently_asked_questions.html (see “What is the difference between attending an ABA-approved law school and a non-ABA approved law school?”) (last visited Jan. 8, 2013); see also AM. BAR ASS’N, SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, *THE LAW SCHOOL ACCREDITATION PROCESS 5–10* (2010), available at <http://apps.americanbar.org/legaled/accreditation/Accreditation%20Brochure%20October%202010.pdf>. The process for obtaining ABA-approval is arduous. According to the ABA’s brochure titled *The Law School Accreditation Process*, an unaccredited law school may apply for provisional ABA-approval after operating for one year. Thereafter, a site evaluation will be scheduled and the school will be required to submit a “self-study” that discusses its strengths, weaknesses, and future goals. After the site evaluation is completed, the Accreditation Committee will hold a hearing wherein the school

The ABA Curriculum Standard 302 requires:

(a) A law school shall require that each student receive substantial instruction in: (1) the substantive law generally regarded as necessary to effective and responsible participation in the legal profession; (2) legal analysis and reasoning, legal research, problem solving, and oral communication; (3) writing in a legal context, including at least one rigorous writing experience in the first year and at least one additional rigorous writing experience after the first year; (4) other professional skills generally regarded as necessary for effective and responsible participation in the legal profession; and (5) the history, goals, structure, values, rules and responsibilities of the legal profession and its members.²⁵

2. *Medicine*

Preparing and applying to medical school is extremely competitive. According to the Association of American Medical Colleges' guidebook titled *Medical School Admission Requirements*, 42,742 people applied to medical school in the U.S. for the 2010 entering class and only 18,665 applicants matriculated.²⁶

The majority of students applying to medical school have "at least a four-year bachelor's degree."²⁷ Moreover, most medical schools require course work in biology, chemistry, physics and English.²⁸

applying for provisional approval must show that it is currently "in substantial compliance" with ABA standards and will be fully compliant within three years. If the school can make such a showing, then provisional approval will be recommended. After obtaining provisional approval, the school will be closely monitored and subject to further site evaluations. After three years, the school must make a showing that it is in full compliance with ABA standards in order to be fully approved. However, monitoring will not end at this point; the ABA will conduct another site evaluation three years after full approval is issued and then every seven years thereafter. Additionally, the ABA requires each fully approved law school to submit an Annual Questionnaire, which inquires into facts relevant to continued compliance with accrediting Standards.

25. AM. BAR ASS'N, SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, 2012-2013 ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 19 (2012), available at http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2012_2013_aba_standards_and_rules.authcheckdam.pdf.

26. AM. ASS'N OF MED. COLLS., MEDICAL SCHOOL ADMISSION REQUIREMENTS 55 (2012-13).

27. ASS'N OF AM. MED. COLLS., THE ROAD TO BECOMING A DOCTOR 5, available at <https://www.aamc.org/download/68806/data/road-doctor.pdf> (last visited Feb. 12, 2013).

28. *Admission Requirements*, ASS'N AM. MED. CS., <http://www.aamc.org/students/applying/requirements> (last visited Jan. 8, 2013).

Applicants also must complete the Medical College Admission Test (MCAT), which is “designed to assess the examinee’s problem solving, critical thinking, and knowledge of science concepts and principles prerequisite to the study of medicine.”²⁹

After fulfilling these requirements, students apply to medical school. In order to obtain a license, the majority of state medical boards require the applicant’s medical school to be accredited by the Liaison Committee on Medical Education (LCME).³⁰ Moreover, only students who attend LCME-accredited medical schools have unrestricted eligibility to take the United States Medical Licensing Examination (USMLE) and participate in the Accreditation Council for Graduate Medical Education (ACGME) residency programs, which are required to obtain state licensure.³¹

Once admitted to an LCME-accredited medical school, the student will begin a strenuous four-year education aimed at obtaining an M.D. During the first year of medical school, students “participate in a symbolic ‘white coat ceremony’” wherein they recite the Hippocratic Oath “committing themselves to medicine’s code of conduct.”³²

The first two years of medical school involve curriculum pertaining to “factual knowledge and key skills such as critical thinking, establishing rapport with patients and colleagues, and conducting medical histories and physical examinations.”³³ During the final two years of medical school, students begin rotations in “clerkships in both primary care and specialty medicine, applying what they have learned in the classroom to supervised experiences with real patients.”³⁴

After obtaining an M.D., medical students apply for residency programs for specialized training. Residency programs are extremely competitive—just like applying to law school and students secure

29. *About the MCAT*, ASS’N AM. MED. CS., <http://www.aamc.org/students/applying/mcat/about> (last visited Jan. 8, 2013).

30. *Frequently Asked Questions*, LIAISON COMMITTEE ON MED. EDUC., <http://www.lcme.org/faqlcme.htm> (last visited Jan. 8, 2013) (“Students and graduates of LCME-accredited medical schools are eligible to take the United States Medical Licensing Examination (USMLE).”).

31. *Preparing for Medical School*, AM. MED. ASS’N, <http://www.ama-assn.org/ama/pub/education-careers/becoming-physician/medical-school/preparing-medical-school.page?> (last visited Jan. 8, 2013).

32. THE ROAD TO BECOMING A DOCTOR, *supra* note 27, at 6.

33. *Id.*

34. *Id.* at 6–7.

them through the National Resident Matching Program.³⁵ Once a student is matched and successfully obtains a residency position, he or she will engage in specialty training for many years.³⁶

3. Accounting

In order to be eligible to obtain a Certified Public Accountant (CPA) license, an individual must complete the educational requirement specified by the state accountancy board.³⁷ Additionally, more than forty states require a candidate to complete 150 hours of state-specified curriculum (which is usually business or accounting related).³⁸ The American Institute of CPAs (AICPA) states that the candidate can complete the 150 hours while pursuing a bachelor's degree or a master's degree.³⁹

In California, for example, there are two "pathways" to completing the specialized educational requirements and ultimately obtaining licensure.⁴⁰ Pathway 1 is intended for those who will only practice in California and requires a bachelor's degree, twenty-four semester units in accounting-related subjects, twenty-four semester units in business-related subjects, passing the Uniform CPA Exam, two years of general accounting experience, and passing an ethics course.⁴¹

Pathway 2 is intended for those who may want to practice outside of California and includes all of the requirements of Pathway 1, except that Pathway 2 requires 150 semester units of education and only one year of general accounting experience. Beginning January 1, 2014, the requirements of Pathway 2 will be mandatory for all those seeking to obtain licensure in California.⁴²

35. *About the NRMP*, NAT'L RESIDENT MATCHING PROGRAM, http://www.nrmp.org/about_nrmp/index.html (last visited Jan. 8, 2013).

36. THE ROAD TO BECOMING A DOCTOR, *supra* note 27, at 8-9.

37. *Licensure*, AM. INST. CPAs, <http://www.aicpa.org/BECOMEACPA/Licensure/Pages/default.aspx> (last visited Jan. 8, 2013).

38. *150 Hour Requirement*, AM. INST. CPAs, <http://www.aicpa.org/BECOMEACPA/LICENSURE/REQUIREMENTS/Pages/default.aspx> (last visited Jan. 8, 2013) ("Currently, over 40 states have adopted the 150-hour requirement, while the remaining states/jurisdictions continue to work toward adoption.")

39. *Id.* (see section "How to Meet the 150-Hour Requirement").

40. CAL. BD. OF ACCOUNTANCY, CPA LICENSING APPLICANT HANDBOOK 12-13 (2012), available at <http://www.dca.ca.gov/cba/publications/applbook.pdf>.

41. *See id.* at 6, 12-13, 17.

42. *Id.* at 13; see also *What It Takes—A Guide to Becoming a CPA*, CALCPA EDUC. FOUND., <http://www.calcpa.org/Content/licensure/requirements.aspx> (last visited Jan. 8, 2013).

There is an explicit list of the accounting and business subjects deemed acceptable by the California Accountancy board, such as: accounting, auditing, external/internal reporting, financial reporting, financial statement analysis, taxation, business administration, business communications, business law, business management, business-related law courses offered by an accredited law school, computer science and information systems, economics, finance, marketing, mathematics, and statistics.⁴³

B. Use of Independent Judgment

Professionals use their best independent judgment to accomplish appropriate results that best fit the interests of their clients. Professionals do not allow their independent judgment to be impaired by outside influences. In each of the three professions examined, this thought is reflected in many different ways.

1. Law

Lawyers are required to use their independent judgment when representing clients. ABA Model Rule 5.4 addresses the professional independence of lawyers by prohibiting certain financial arrangements.⁴⁴ The rule generally provides that lawyers may not share legal fees with a non-lawyer⁴⁵ or form partnerships with non-lawyers if the partnership entails any activity that is the practice of law.⁴⁶ In situations where a third party has recommended the lawyer's services to another or pays for legal services on behalf of another, the rule requires that such a third party may not interfere with the lawyer's independent professional judgment in the rendering of such services.⁴⁷ Finally, lawyers are prohibited from practicing law in corporations if a non-lawyer is either a shareholder, a director or officer, or if a non-lawyer would otherwise have control over the lawyer's professional judgment.⁴⁸ A lawyer's independent professional judgment may also be affected by the lawyer's duty of confidentiality and loyalty to current and former clients. ABA Model Rule 1.7 prohibits a lawyer from representing a client if the

43. CAL. BD. OF ACCOUNTANCY, *supra* note 40, at 13.

44. *See* MODEL RULES OF PROF'L CONDUCT R. 5.4 (2012).

45. *Id.* R. 5.4(a).

46. *Id.* R. 5.4(b).

47. *Id.* R. 5.4(c).

48. *Id.* R. 5.4(d).

representation “will be directly adverse to another client” or if the representation “will be materially limited” due to the lawyer’s responsibilities to another client, a third person, or because of the lawyer’s own personal interests.⁴⁹ Such representation can only take place if the lawyer abides by certain requirements, such as obtaining informed consent from the clients who would be affected by the representation.⁵⁰

Lawyers are also generally prohibited from specific acts that are likely to affect their professional judgment, such as entering into a business transaction with a client or acquiring a financial interest that is adverse to a client,⁵¹ soliciting gifts from a client,⁵² prospectively limiting liability for malpractice,⁵³ and having sexual relations with a client.⁵⁴ With the exception of sexual relations with a client, clients can otherwise consent to these prohibitions upon written informed consent.⁵⁵

Most states have adopted a version of the ABA Model Rules. Although California has not yet done so, the California Rules of Professional Conduct addressing conflicts of interest closely parallel the ABA Model Rules. California Professional Conduct Rule (CPCR) 1-310 prohibits forming a partnership with a non-lawyer if the partnership involves activities that consist of the practice of law.⁵⁶ CPCR 1-320(A) generally prohibits sharing legal fees with a non-lawyer and CPCR 1-320(B) prohibits the promising of compensation or gifts in exchange for recommending or referring the lawyer’s services.⁵⁷ CPCR 3-300 prohibits entering into a business transaction with a client or acquiring a pecuniary interest adverse to a client.⁵⁸ CPCR 3-310 prohibits a lawyer from representing a matter that would be adverse to the client due to the lawyer’s own personal conflicts or because of the lawyer’s duties to current and former clients.⁵⁹ CPCR 3-310(F) prohibits accepting compensation for legal services from

49. *Id.* R. 1.7(a)(1)-(2).

50. *Id.* R. 1.7(b)(4).

51. *Id.* R. 1.8(a).

52. *Id.* R. 1.8(c).

53. *Id.* R. 1.8(h)(1).

54. *Id.* R. 1.8(j).

55. *See id.* R. 1.8(a)(3), 1.8(f), 1.8(g).

56. CAL. RULES OF PROF'L CONDUCT R. 1-310 (2012).

57. *Id.* R. 1-320(A)-(B).

58. *Id.* R. 3-300.

59. *Id.* R. 3-310.

someone other than the client.⁶⁰ CPR 3-320 prohibits representing a client in a matter where the lawyer has a close personal relationship with the other party's lawyer (e.g., spouse, family member, etc.).⁶¹ However, clients can consent to these prohibitions.

A couple of other rules address this problem in specific situations. CPR 4-400 prohibits inducing a client to make a substantial gift to the lawyer.⁶² With certain exceptions, a lawyer cannot pay the personal or business expenses of a client.⁶³

However, in California, a lawyer cannot in any circumstance prospectively contract to limit liability for malpractice.⁶⁴ Also, sexual relations with a client are not outright prohibited in California. CPR 3-120(B) prohibits demanding sex from a client as a condition of representation or using undue influence to coerce a client into having sex.⁶⁵ CPR 3-120(B)(3) prohibits continued "representation of a client with whom the [lawyer] has sexual relations if such sexual relations cause the [lawyer] to perform legal services incompetently."⁶⁶

2. *Medicine*

The independent judgment of doctors is also an important aspect of the practice of medicine. In California, for example, pursuant to California Business and Professions Code § 2052, there is an explicit policy prohibiting the corporate practice of medicine.⁶⁷ According to the Medical Board of California's *Guide to the Laws Governing the Practice of Medicine*, "[t]he policy expressed . . . against the corporate practice of medicine is to prevent unlicensed persons from interfering with or influencing the physician's professional judgment."⁶⁸

60. *Id.* R. 3-310(F).

61. *Id.* R. 3-320.

62. *Id.* R. 4-400.

63. *Id.* R. 4-210.

64. *Id.* R. 3-400(A).

65. *Id.* R. 3-120(B)(1)–(2).

66. *Id.* R. 3-120(B)(3).

67. CAL. BUS. & PROF. CODE § 2052 (West 2012).

68. MED. BD. OF CAL., GUIDE TO THE LAWS GOVERNING THE PRACTICE OF MEDICINE BY PHYSICIANS AND SURGEONS 24–25 (6th ed. 2010), available at http://www.mbc.ca.gov/publications/laws_guide.pdf.

Doctors have a fiduciary obligation to a patient to exercise their professional independent judgment.⁶⁹ Hafemeister and Gulbrandsen compare the physician-patient relationship to other fiduciary relationships involving professionals.⁷⁰ They also base their assertion of an existence of a fiduciary relationship between the doctor and patient due to the fact that there is a large knowledge disparity between the two parties and the level of trust the patient places with the doctor.⁷¹

Despite the prohibition on the corporate practice of medicine, the exercise of independent judgment on the part of medical doctors in dispensing their duties to their patients is challenged in various ways. These challenges can and often do stem from the conflict between patients' demands and doing what is the best for the patient,⁷² the conflict between the patient's interests and the doctor's financial interest in providing services,⁷³ and most notably, from the influence of the pharmaceutical industry on the prescribing habits of doctors and the medical profession in general.⁷⁴

The *American College of Physicians Ethics Manual* states:

The physician's primary commitment must always be to the patient's welfare and best interest The interests of the patient should always be promoted regardless of financial arrangements Although the physician should be fairly compensated for services rendered, a sense of duty to the patient should take precedence over concern about compensation.⁷⁵

The American Medical Association (AMA) Code of Ethics states:

Under no circumstances may physicians place their own financial interests above the welfare of their patients. The primary objective of the medical profession is to render service to humanity; reward or

69. Thomas L. Hafemeister & Richard M. Gulbrandsen, Jr., *The Fiduciary Obligation of Physicians to "Just Say No" if an "Informed" Patient Demands Services that Are Not Medically Indicated*, 39 SETON HALL L. REV. 335, 367 (2009).

70. *Id.* at 370.

71. *Id.* at 371.

72. See Allan S. Brett & Laurence B. McCullough, *Addressing Requests by Patients for Nonbeneficial Interventions*, 307 J. AM. MED. ASS'N 149, 149 (2012).

73. INST. OF MED. OF THE NAT'L ACADS., CONFLICT OF INTEREST IN MEDICAL RESEARCH, EDUCATION, AND PRACTICE 168 (Bernard Lo & Marilyn J. Field eds., 2009), available at <http://www.ncbi.nlm.nih.gov/books/NBK22942/pdf/TOC.pdf>.

74. David Blumenthal, M.D., M.P.P., *Doctors and Drug Companies*, 351 NEW ENG. J. MED. 1885, 1885-90 (2004).

75. AM. COLL. OF PHYSICIANS ETHICS MANUAL 4 (6th ed., 2011), available at http://www.acponline.org/running_practice/ethics/manual/manual6th.htm#physician-patient [hereinafter ACP ETHICS MANUAL].

financial gain is a subordinate consideration. For a physician to unnecessarily hospitalize a patient, prescribe a drug, or conduct diagnostic tests for the physician's financial benefit is unethical. If a conflict develops between the physician's financial interest and the physician's responsibilities to the patient, the conflict must be resolved to the patient's benefit.⁷⁶

Physicians face conflicts of interest when it comes to payment of services as "[e]ach major method of paying physicians has the potential to put physicians' primary interest in promoting the best interests of their patients at odds with their secondary financial interests."⁷⁷ Payment methods in which patients pay per service provided may influence the physician to increase the volume of services provided.⁷⁸ Payment based on a capitated basis may lead to the underprovision of care.⁷⁹

Conflicts of interest can also arise when physicians refer patients to facilities in which they have ownership interests.⁸⁰ In response to this concern, federal law⁸¹ now prohibits referring Medicare or Medicaid beneficiaries to facilities for "designated health services" if the physician or the physician's immediate family members have a financial interest with the facility.⁸² Also, the Centers for Medicaid and Medicare Services issued a new rule in 2008 that requires physicians to disclose any financial interest in hospitals to patients.⁸³

Perhaps the biggest threat to the independent judgment of doctors is the pharmaceutical industry. The threat comes in the form of a conflict of interest, in which a doctor's "primary ethical or professional interest clashes with financial self-interest."⁸⁴ While there admittedly are some positive aspects of the profession-industry relationship, there exists a real and perceived threat to medicine as a profession when the pharmaceutical industry, whose main goal is

76. AM. MED. ASS'N CODE OF ETHICS, Op. 8.03 (1994), available at <http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion803.page?>.

77. INST. OF MED. OF THE NAT'L ACADS., *supra* note 73, at 168.

78. *Id.*

79. *Id.* at 169.

80. *Id.*

81. *See, e.g.*, 42 U.S.C. §§ 1395nn, 1396b(s) (2006).

82. INST. OF MED. OF THE NAT'L ACADS., *supra* note 73, at 170.

83. *Id.*

84. Jason Dana & George Loewenstein, *A Social Science Perspective on Gifts to Physicians From Industry*, 290 J. AM. MED. ASS'N 252, 252 (2003).

profit maximization for shareholders, becomes so entangled with virtually every aspect of the medical profession.⁸⁵

The medical community has come under heavy criticism in recent decades due to its many financial ties with the pharmaceutical industry, both in practice and in the educational setting.⁸⁶ A doctor's introduction to the pharmaceutical industry begins in medical school, where drug company representatives offer students free lunches, educational materials, and small gifts (e.g., pens, mugs, tote bags, etc.).⁸⁷ These interactions continue on into the practice setting, as representatives try to entice doctors to prescribe their drugs (even for off-label uses) by offering them not just small gifts and free meals, but free drug samples, opportunities for paid speaking engagements, research funding, and other perks.⁸⁸ The pharmaceutical industry also has a significant presence in continuing medical education programs and medical research through generous sponsorship.⁸⁹

Although some doctors may feel insulted by the notion that drug company representatives could influence the way they treat patients, studies have shown that there is a strong correlation between the amount of time a doctor spends with drug representatives and that doctor's prescribing habits.⁹⁰ Studies have also shown that the acceptance of small gifts from drug representatives also influences prescribing habits.⁹¹

Ultimately, patients and the public pay the price. The drug companies' marketing efforts to doctors "may contribute to less savory social consequences, including increasing drug costs and the misuse or overuse of medications in ways that may adversely affect

85. See *Industry Conflict of Interest Policy*, ALPERT MED. SCH., <http://brown.edu/academics/medical/student-affairs/policy-and-procedure/industry-conflict-interest-policy> (last visited Jan. 9, 2013).

86. Phillip Greenland, M.D., *Time for the Medical Profession to Act: New Policies Needed Now on Interactions Between Pharmaceutical Companies and Physicians*, 169 ARCHIVES INTERNAL MED. 829, 829–31 (2009).

87. Robert Matthews, *Hooked: Ethics, the Medical Profession, and the Pharmaceutical Industry*, 49 J. NUCLEAR MED. 2068, 2068 (2008) (reviewing HOWARD BRODY, *HOOKED: ETHICS, THE MEDICAL PROFESSION, AND THE PHARMACEUTICAL INDUSTRY* (2007)). However, several medical schools have instituted new policies regulating interactions between drug representatives and its students, including an outright prohibition on students accepting gifts of any kind from representatives. See, e.g., *Industry Conflict of Interest Policy*, *supra* note 85.

88. Greenland, *supra* note 86, at 829–31.

89. Matthews, *supra* note 87, at 2068–69.

90. Ashley Wazana, M.D., *Physicians and the Pharmaceutical Industry: Is a Gift Ever Just a Gift?*, 283 J. AM. MED. ASS'N 373, 375–80 (2000).

91. Dana & Loewenstein, *supra* note 84, at 252–55.

patients.”⁹² Also, doctors who choose to prescribe brand name drugs over generic counterparts may result in higher healthcare costs for patients.⁹³ Another consequence is the erosion of trust in the medical profession, as patients view gifting as inappropriate.⁹⁴ Indeed, “[t]he trust placed in the medical profession by the public is subject to the perception that physicians are unduly influenced by the pharmaceutical and device industries.”⁹⁵

Professional societies such as the American Medical Association (AMA) and the American College of Physicians (ACP) have adopted specific guidelines or codes to address the physician-industry relationship. To avoid the appearance of impropriety, the *ACP Ethics Manual* states that physicians must disclose any conflict of interests to patients.⁹⁶ It is also common practice for editors of professional journals to require that contributors disclose any potential conflicts of interest.⁹⁷

However, the *Manual* only “strongly discourages” the acceptance of gifts, hospitality, and subsidies “from the health care industry that might diminish, or appear to others to diminish, the objectivity of professional judgment.”⁹⁸ The manual states that physicians must evaluate whether the acceptance of gifts is “ethically appropriate” and the gift’s potential influence on independent judgment.⁹⁹ In making this evaluation, physicians should consider how the public or patients would perceive the arrangement, how colleagues would perceive the arrangement, the purpose of the gift or offer, and how the physician herself would perceive the arrangement if her own physician accepted such an offer.¹⁰⁰

3. Accounting

Independent judgment is also important in the field of accounting. The AICPA has very clear rules about independence.¹⁰¹

92. Blumenthal, *supra* note 74, at 1885.

93. Wazana, *supra* note 90, at 378–79.

94. *Industry Conflict of Interest Policy*, *supra* note 85.

95. *Id.*

96. ACP ETHICS MANUAL, *supra* note 75.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. AM. INST. OF CPAS CODE OF PROF'L CONDUCT, ET § 101—Independence (1998), available at http://www.aicpa.org/Research/Standards/CodeofConduct/Pages/et_101.aspx.

Independence is impaired if the CPA “[h]ad or was committed to acquire any direct or material indirect financial interest in the client.”¹⁰²

Under AICPA Code 101, auditor independence must be both of mind and appearance.¹⁰³ California has a similar rule that prohibits a licensee from “concurrently engag[ing] in the practice of public accountancy and in any other business or occupation which impairs the licensee’s independence, objectivity, or creates a conflict of interest in rendering professional services.”¹⁰⁴

Independence of mind refers to a state of mind that permits the performance of service without being affected by influences that compromise professional judgment. Independence in appearance means avoiding circumstances that would allow a reasonable third party to “conclude that the integrity, objectivity, or professional skepticism of a firm or a member of the attest engagement team had been compromised.”¹⁰⁵ The California Board of Accountancy (CBA) has promulgated similar rules requiring that CPAs remain “independent in the performance of services in accordance with professional standards.”¹⁰⁶

AICPA Code 102, “Integrity and Objectivity,” requires that CPAs be free of conflicts.¹⁰⁷ There are several common situations in which a conflict of interest can arise, including: when an auditor provides both “attested” and “consulting” services to a public company; when an auditor is called to testify regarding the activities of his or her client;¹⁰⁸ when an auditor receives or pays a commission for the referral of a client;¹⁰⁹ when an auditor accepts employment from a former or current client;¹¹⁰ and

if a member performs a professional service for a client or employer and the member or his or her firm has a relationship with another person, entity, product, or service that could, in the member’s

102. *Id.* These conflict rules are similar to those for lawyers.

103. *Id.*

104. CAL. CODE REGS. tit. 16, § 57 (2011).

105. T.C. Fleming & John J. Molenda, *The Ethical Implications of Attorney Collaborations with Accounting Experts*, 1958 PRAC. L. INST., CORP. 977, 986 (2012).

106. CAL. CODE REGS. tit. 16, § 65 (2011).

107. *See* Fleming & Molenda, *supra* note 105, at 1003.

108. *Id.* at 988.

109. CAL. BUS. & PROF. CODE § 5061 (West 2012).

110. *Id.* § 5062.2.

professional judgment, be viewed by the client, employer, or other appropriate parties as impairing the member's objectivity.¹¹¹

Both the CBA and the AICPA have enacted rules that attempt to limit the occurrence of conflicts and impose discipline if conflicts occur.

In 2002, Congress passed the Sarbanes-Oxley Act (the Act) in response to problems in regulating the capital markets. In particular, the Act sought to re-establish auditor independence from the public companies they audit.¹¹² Over the last fifty years the nature and scope of auditor services evolved to the point where auditors derived a large portion of their income by providing non-auditing services to the same companies they were auditing.¹¹³ Arthur Andersen, for example, generated \$25 million in audit fees from Enron in 2000, while generating \$27 million in non-audit services fees.¹¹⁴ This created a significant conflict of interest that the Act attempts to eliminate by prohibiting the contemporaneous provision of auditing and non-auditing services.¹¹⁵ The Act explicitly lists non-auditing services that are not to be performed contemporaneously with auditing services, such as bookkeeping, appraisal or valuation, banking services, or investment advice.¹¹⁶ It further provides that the Public Company Accounting Oversight Board or the SEC may add other non-auditing services to the list as they see fit.¹¹⁷ The Act also limits conflicts of interest by requiring auditor rotation and a cooling-off period for audit firm alumni.¹¹⁸

III. EXPERT KNOWLEDGE

Each of these professions requires a great deal of expert knowledge. As the section on specialized education illustrated, each of these professions requires a great deal of training. One way this is demonstrated is through the requirement that in order to prove that a doctor, lawyer, or accountant performed below the standard of care,

111. Fleming & Molenda, *supra* note 105, at 1003–04.

112. *See* 15 U.S.C. § 7233(b) (2006).

113. Stephen C. Gara & Craig J. Langstraat, *The Sarbanes-Oxley Act of 2002: A New Ballgame for Accountants*, 34 U. MEM. L. REV. 73, 95 (2003).

114. *Id.*

115. *See* 15 U.S.C. § 7233(b).

116. Gara & Langstraat, *supra* note 113, at 95–96; *see also* 15 U.S.C. § 78j-1(g).

117. 15 U.S.C. § 7213(b).

118. 15 U.S.C. § 7232(a)(c).

an expert must testify.¹¹⁹ A layperson, like an ordinary juror, cannot be expected to understand whether the services were competently performed without expert assistance.

A. Law

In a malpractice claim against an attorney, the plaintiff must show that the lawyer owed the plaintiff a duty, that the lawyer breached that duty, and that the breach was a cause-in-fact and legal cause of the plaintiff's injury.¹²⁰ A lawyer owes a client the duty to exercise due care,¹²¹ which requires the lawyer to "exercise the competence and diligence normally exercised by lawyers in similar circumstances."¹²² Despite arguments that expert testimony in legal malpractice cases are not as necessary as they are in other professional malpractice cases, courts typically require that a legal malpractice plaintiff produce an expert testimony in order for the case to go to a jury.¹²³ The role of the expert is to help show (or refute) that the defendant lawyer failed to "exercise the competence and diligence normally exercised by lawyers in similar circumstances,"¹²⁴ i.e., that the lawyer breached the duty of care.

Expert testimony is not required where it would be obvious to the layperson that the lawyer has breached the standard of care.¹²⁵ However, where the standard of care is not a matter of common knowledge, necessitating an expert, the expert's testimony on the standard of care is deemed conclusive.¹²⁶

B. Medicine

The AMA's Code of Ethics provides that "physicians have an obligation to assist in the administration of justice" by providing

119. See 70 1 C.J.S. *Accountants* § 26 (2012); 4 C.J.S. *Legal Malpractice* § 37:23 (2012); C.J.S. *Physicians and Surgeons* § 155 (2012).

120. 7 AM. JUR. 2d *Attorneys at Law* § 221 (2012).

121. RESTATEMENT (THIRD) OF LAW GOVERNING LAW: DUTY OF CARE TO A CLIENT § 50 (2000).

122. RESTATEMENT (THIRD) OF LAW GOVERNING LAW: THE STANDARD OF CARE § 52(1) (2000).

123. See John Leubsdorf, *Legal Malpractice and Professional Responsibility*, 48 RUTGERS L. REV. 101, 120 (1995).

124. RESTATEMENT (THIRD) OF LAW GOVERNING LAW: THE STANDARD OF CARE, *supra* note 122.

125. *Id.* § 52 cmt. g.

126. See, e.g., *Lysick v. Walcom*, 258 Cal. App. 2d 136, 156 (1968).

medical testimony.¹²⁷ Because of the information disparity between a layperson and a physician, the testimony of physicians in legal proceedings, especially expert testimony, is often necessary to effectively advance medical and health-related cases and to avoid arbitrary and unfair outcomes.¹²⁸

Physicians can provide medical testimony in two different capacities. A physician can be called to testify as a fact witness, presenting factual findings and observations.¹²⁹ A physician can also serve as an expert witness where the physician's expert knowledge is applied to the facts of the case to help explain them to a jury.¹³⁰

In a claim for medical negligence, the plaintiff must show that the medical professional's conduct constituted a breach of the acceptable "professional standard of care."¹³¹ In determining whether there was a breach of the standard of care, only the opinion of other medical professionals is relevant evidence in setting the standard of care.¹³² The locality rule, which set the standard of care based on the geographic location of the medical professional, has largely been abandoned in favor of a national standard.¹³³ Furthermore, expert testimony is also necessary to determine whether the breach of the standard of care caused the plaintiff's injury.¹³⁴ Medical expert testimony also plays an important role in products liability and toxic tort litigation, especially where it involves complex issues of causation.¹³⁵

C. Accounting

In the accounting context, expert witnesses are used to determine whether the conduct of a CPA fell below the standards described in

127. AM. MED. ASS'N CODE OF ETHICS, Op. 9.07 (2004), available at <http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion907.page>.

128. *Id.*

129. MICHAEL S. GOLDRICH, REPORT OF THE COUNCIL ON ETHICAL AND JUDICIAL AFFAIRS REP NO. 12-A-04 2 (2004), available at <http://www.ama-assn.org/resources/doc/code-medical-ethics/907a.pdf>.

130. *Id.*

131. Sara Rosenbaum, *The Impact of United States Law on Medicine as a Profession*, 289 J. AM. MED. ASS'N 1546, 1550 (2003).

132. *Id.*

133. *Id.* at 1551.

134. Goldrich, *supra* note 129, at 3.

135. David E. Bernstein, *Getting to Causation in Toxic Tort Cases*, 74 BROOK. L. REV. 51, 60 (2008).

the AICPA code or relevant state statutes.¹³⁶ The AICPA code requires that CPAs exercise competence, due care, and oversight, and undertake “only those professional services that the member or the member’s firm can reasonably expect to be completed with professional competence.”¹³⁷ CPAs must exercise professional due care in the performance of professional services, adequately plan and supervise the performance of professional services, and refrain from conveying unfounded conclusions and rendering services for which he or she does not have sufficient competence.¹³⁸ Further, a CPA must be technically competent and must possess the ability to execute professional services.¹³⁹ If the CPA provides financial conclusions the CPA must provide a reasonable basis for his or her conclusions.¹⁴⁰ Lastly, if a CPA is unsure of his or her recommendations, he or she must obtain sufficient relevant data to afford a reasonable basis for conclusions or recommendations in relation to any professional services performed.¹⁴¹

California requires that applicants for a CPA license obtain hands-on experience before the issuance of a license.¹⁴² Applicants must also complete at least one year of qualifying experience, which may include providing any type of service or advice involving the use of accounting, attest, compilation, management advisory, financial advisory, tax or consulting skills.¹⁴³ The experience must be performed in accordance with applicable professional standards and under the supervision or in the employ of a person licensed or otherwise having comparable authority under the laws of any state or country to engage in the practice of public accountancy.¹⁴⁴ “Experience in private or governmental accounting or auditing shall be completed under the supervision of an individual licensed by a state to engage in the practice of public accountancy.”¹⁴⁵

136. *Diversified Graphics, Ltd. v. Groves*, 868 F.2d 293, 296 (8th Cir. 1989).

137. *Fleming & Molenda*, *supra* note 105, at 992.

138. *Id.*

139. *Id.*

140. *Id.* at 995.

141. *Id.* at 995.

142. CALCPA EDUC. FOUND., *supra* note 42.

143. CAL. BD. OF ACCOUNTANCY, *supra* note 40, at 17.

144. *Id.*

145. CAL. BUS. & PROF. CODE § 5093(d) (West 2012).

IV. TRUST

Professionals are trusted to help their clients or patients with things that are sensitive and profoundly important. This idea of trust is fundamental to the relationship between a professional and their client or patient. Without trust, our clients won't tell us what we need to know so that we may use our best independent judgment on their behalf. Without trust, our patients or clients won't follow our advice and sign their wills, take their medicine, or file their tax returns.

A. Law

Lawyers are, first and foremost, fiduciaries. The client-lawyer relationship is clearly an agency relationship. The Introductory Note to Chapter 2, entitled "The Client-Lawyer Relationship," of the Restatement (Third) of the Law Governing Lawyers, states in part:

The subject of this Chapter is, from one point of view, derived from the law of agency. It concerns a voluntary arrangement in which an agent, a lawyer, agrees to work for the benefit of a principal, a client. A lawyer is an agent, to whom clients entrust matters, property, and information, which may be of great importance and sensitivity, and whose work is usually not subject to detailed client supervision because of its complexity.¹⁴⁶

But the client-lawyer relationship is not an ordinary agency relationship. The Introductory Note continues: "Because those characteristics of the client-lawyer relationship make clients vulnerable to harm, and because of the importance to the legal system of faithful representation, the law stated in this Chapter provides a number of safeguards *beyond those generally provided to principals.*"¹⁴⁷ In other words, agency law as applied to lawyers is supposed to be *more protective* of clients than generally applicable agency law, not less.

As agents for their clients, lawyers are required to abide by their clients' "decisions concerning the objectives of representation and . . . shall consult with the client as to the means by which they are to be pursued."¹⁴⁸

146. RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS: THE CLIENT-LAWYER RELATIONSHIP ch. 2, Introductory Note (2000).

147. *Id.* (emphasis added).

148. MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2012).

Trust is the hallmark of the lawyer-client relationship and is embodied in the lawyer's duty of confidentiality to the client.¹⁴⁹ Effective representation of a client can only be achieved if the client is able to entrust sensitive and even damaging information to the lawyer.¹⁵⁰ ABA Model Rule 1.6(a) states that a lawyer must not "reveal information relating to the representation of a client"¹⁵¹ Exceptions to the duty of confidentiality include: the client's informed consent, where disclosure is "impliedly authorized,"¹⁵² or where disclosure is necessary to prevent death or substantial bodily harm.¹⁵³ In California, a lawyer's duty of confidentiality is codified in California Business and Professions Code section 6068(e).¹⁵⁴

B. Medicine

Doctors are also considered to be fiduciaries for their patients.¹⁵⁵ The medical decision-making model known as "medical paternalism" has given way to the model of "patient autonomy," which is now the dominant decision-making model in both medical ethics and health law.¹⁵⁶ Whereas medical paternalism was based on the aphorism of "doctor knows best," patient autonomy "is based on the idea that physicians do not treat typical patients; rather, they take care of particular patients and the particular patient knows his values and goals and thus is in the best position to make decisions regarding his life and health."¹⁵⁷

Related to the concept of patient autonomy is the doctrine of informed consent. Because of the information gap between patient and physician, the patient autonomy model is ineffective if the patient lacks the information necessary to make a decision in his best interest.¹⁵⁸ Informed consent, at its most basic, requires that physicians disclose to patients the "disease process, the risks and benefits of the proposed treatment, and any viable alternative

149. *Id.* R 1.6 cmt. 2.

150. *Id.*

151. *Id.* R. 1.6(a).

152. *Id.*

153. *Id.* R. 1.6(b)(1).

154. CAL. BUS. & PROF. CODE § 6068(e) (West 2012).

155. See Arnold S. Relman, *Medical Professionalism in a Commercialized Healthcare Market*, 75 CLEVELAND CLINIC J. MED. S33, S34 (2008).

156. Amir Halevy, *Medical Futility, Patient Autonomy, and Professional Integrity: Finding the Appropriate Balance*, 18 HEALTH MATRIX 261, 265–66 (2008).

157. *Id.* at 266.

158. *Id.*

therapies, including doing nothing.”¹⁵⁹ The failure to obtain informed consent from a patient results in the violation of the physician’s duty to the patient and exposes the physician to potential liability.¹⁶⁰

The doctrine of informed consent is included in the AMA Code of Ethics in Opinion 10.01(1).¹⁶¹ The Code also states that it is the patient who ultimately makes the final decision with respect to treatment, including the decision to refuse any recommended treatment.¹⁶²

Physicians owe patients the duty of confidentiality. The AMA Code of Ethics states: “The physician should not reveal confidential communications or information without the consent of the patient, unless provided for by law or by the need to protect the welfare of the individual or the public interest.”¹⁶³ The duty of confidentiality is deemed so vital to the provision of care that the California Evidence Code includes a privilege for “confidential communications between a patient and physician.”¹⁶⁴ However, there are several exceptions to this privilege, including the crime or fraud exception, the patient-litigant exception, and in claims of breach of duty by either the patient or physician.¹⁶⁵

C. Accounting

When a CPA undertakes consulting services, such as providing a financial recommendation, the CPA owes a duty to the client. There are three duties that demonstrate the importance of trust between the CPA and his or her client: the duty to retain confidential information; the duty to act as a fiduciary for the benefit of the client; and the duty to perform services competently.¹⁶⁶

Disclosure of confidential information is prohibited by both the AICPA Code of Professional Conduct and the California Code of

159. *Id.* at 267.

160. *Id.* at 266.

161. AM. MED. ASS’N CODE OF ETHICS, Op. 10.01(1) (1993), *available at* <http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion1001.page?>; *see also* ACP ETHICS MANUAL, *supra* note 75.

162. AM. MED. ASS’N CODE OF ETHICS, *supra* note 161, at Op. 10.01(2).

163. *Id.* at Op. 10.01(4).

164. CAL. EVID. CODE §§ 990–995 (West 2012).

165. *Id.* §§ 996–1007.

166. 1 C.J.S. *Accountants* § 14 (2012).

Regulations.¹⁶⁷ However, both codes include exceptions that allow disclosure of confidential information in certain circumstances.¹⁶⁸ For example, an accountant is permitted to disclose a client's confidential information in compliance with a subpoena or court order in response to an ethics inquiry by a regulatory board or in response to a civil lawsuit.¹⁶⁹

An accountant generally does not owe a fiduciary duty to his or her client. For example, where an accountant is engaged to audit the financial statements of a client the accountant does not have a fiduciary relationship with the client, largely because the accountant is required to be independent of the client so as to provide reliable information to third parties.¹⁷⁰ However, a fiduciary relationship may exist "where a client justifiably reposes trust and confidence in an accountant to act in the client's interest."¹⁷¹ Fiduciary relationships are commonly found to exist

where the accountant renders personal financial, investment, or tax advice to a client or where the accountant manages the assets or business of a client. In addition, an accountant for a pension fund who goes beyond the normal role of a fund auditor may be found to be a fiduciary under the Employee Retirement Income Security Act of 1974 (ERISA).¹⁷²

In addition to reinforcing the statutory duties to maintain client confidence and perform services competently,¹⁷³ the fiduciary duty also includes the duty of loyalty and the duty to disclose relevant facts and render accounts.¹⁷⁴

167. AM. INST. OF CPAS CODE OF PROF'L CONDUCT § ET 301—Confidential Client Information (1992), available at http://www.aicpa.org/Research/Standards/CodeofConduct/Pages/et_300.aspx; CAL. CODE REGS. tit. 16, § 54.1 (2011).

168. AM. INST. OF CPAS CODE OF PROF'L CONDUCT § ET 301—Confidential Client Information (1992), available at http://www.aicpa.org/Research/Standards/CodeofConduct/Pages/et_300.aspx; CAL. CODE REGS. tit. 16, § 54.1 (2011).

169. CAL. CODE REGS. tit. 16, § 54.1 (2011).

170. DAN L. GOLDWASSER, M. THOMAS ARNOLD, & JOHN H. EICKEMEYER, *Breach of Fiduciary Duty Claims*, in ACCOUNTANTS' LIABILITY §1:4.4 (2011).

171. DAN L. GOLDWASSER, M. THOMAS ARNOLD, & JOHN H. EICKEMEYER, *Circumstances in Which Accountant Is a Fiduciary*, in ACCOUNTANTS' LIABILITY §7:1.4 (2011).

172. *Id.*

173. The duty to perform services competently is discussed in Part IV, *supra*.

174. 1 C.J.S. *Accountants* § 14 (2012).

V. ETHOS OTHER THAN PROFIT MAXIMIZING

Because each of the examined professions appears to have something else other than pure profit maximization at its core, each has developed codes of conduct, self-regulation, and other mechanisms that can help to protect the public health and safety.

As Julius Henry Cohen noted:

It is because of the lawyer's position as an officer of the Court that the disciplinary process is made practicable. Destroy the conception of the Bar as a profession . . . and you at once remove the basis upon which the lawyer may be brought to prompt and summary accountability. Take away the conception of the practice of law as a profession—make it a business—and at once you destroy the very basis of professional discipline.¹⁷⁵

This section looks at the licensing and discipline rules for each of the three professions.

A. Licensing

1. Law

In the field of law, the primary governing body is the ABA. The ABA was organized in 1878 “with the stated object of advancing ‘the science of jurisprudence,’ promoting ‘the administration of justice and uniformity of legislation throughout the Union,’ [and] upholding ‘the honor of the profession of the law’”¹⁷⁶

In addition, each state has its own regulatory and licensing scheme for lawyers. According to the ABA, in order to obtain a license to practice law, “law school graduates must apply for bar admission through a state board of bar examiners.”¹⁷⁷ The law student must show worthiness by demonstrating competence, which is shown by having an “acceptable education credential . . . from a law school that meets educational standards, and by achieving a passing score on the bar examination.”¹⁷⁸

Additionally, most jurisdictions require that the law student must receive a passing score on the Multistate Professional Responsibility

175. Cohen, *supra* note 2, at 22–23.

176. *Id.* at 104.

177. *Bar Admissions Basic Overview*, A.B.A., http://www.americanbar.org/groups/legal_education/resources/bar_admissions/basic_overview.html (last visited Jan. 10, 2013).

178. *Id.*

Examination (MPRE) and pass character and fitness requirements prior to being sworn in and obtaining their licenses.¹⁷⁹

The MPRE is a multiple choice test, administered on behalf of the National Conference of Bar Examiners, that aims to “measure the examinee’s knowledge and understanding of established standards related to a lawyer’s professional conduct”¹⁸⁰ The MPRE focuses on the rules “governing the conduct of lawyers” and tests examinees on the ABA’s “disciplinary rules of professional conduct, [the] Model Rules of Professional Conduct [and] the ABA Model Code of Judicial Conduct, [as well as] controlling constitutional decisions and generally accepted principles established in leading federal and state cases and in procedural and evidentiary rules.”¹⁸¹

According to the MPRE’s website, achieving a passing score on the MPRE is a prerequisite to obtaining a law license in all U.S. jurisdictions except Maryland, Washington and Wisconsin.¹⁸² An examinee’s scaled score can range from a low of 50 to a high of 150, with the mean scaled score hovering at 100.¹⁸³ A passing score varies amongst jurisdictions.¹⁸⁴ For example, the minimum passing scaled score in California is 86,¹⁸⁵ whereas in Pennsylvania, the minimum passing scaled score is 75.¹⁸⁶

In addition to the MPRE, applicants for a law license must also have their character and fitness assessed by the board of bar examiners in their jurisdiction.¹⁸⁷ The ABA states that this assessment is necessary “[b]ecause law is a public profession . . . [and] the degree of harm a lawyer, once licensed, can inflict is substantial.”¹⁸⁸

179. *Id.*

180. *Multistate Professional Responsibility Exam (MPRE)*, NAT’L CONF. BAR EXAMINERS, <http://www.ncbex.org/multistate-tests/mpre> (last visited Jan. 10, 2013).

181. *Id.*

182. *Id.*

183. *MPRE Scoring*, NAT’L CONF. BAR EXAMINERS, <http://www.ncbex.org/multistate-tests/mpre/mpre-scoring> (last visited Jan. 10, 2013).

184. *See* NAT’L CONF. BAR EXAMINERS, *supra* note 180 (see “Jurisdiction Information” subsection).

185. *Multistate Professional Responsibility Examination*, ST. B. CAL., <http://admissions.calbar.ca.gov/Examinations/MultistateProfessionalResponsibilityExamination.aspx> (last visited Jan. 10, 2013).

186. *Multistate Professional Responsibility Examination Information*, PA. BOARD LAW EXAMINERS, http://www.pabarexam.org/pdf/203_205/mpreinfo.pdf (last visited Jan. 10, 2013).

187. *See* A.B.A., *supra* note 177.

188. *Id.*

2. *Medicine*

Medicine has a similar state-run system with a national examination. After taking the MCAT and being admitted into an accredited medical school, medical students must take the USMLE as part of the process for obtaining their medical license.¹⁸⁹ The USMLE is sponsored by the Federation of State Medical Boards and the National Board of Medical Examiners.¹⁹⁰ Similar to the legal profession, the medical licensing bodies are comprised on state medical boards and each jurisdiction has its own procedure for obtaining a medical license.¹⁹¹ Nevertheless, the results of the USMLE are utilized in every jurisdiction as part of their licensing procedure.¹⁹²

The USMLE has a unique format that involves a three-step examination designed to measure the examinee's "ability to apply knowledge, concepts, and principles, and to demonstrate fundamental patient-centered skills, that are important in health and disease and that constitute the basis of safe and effective patient care."¹⁹³

Medical students take the first step of the examination during their second year of medical school.¹⁹⁴ This initial test measures the examinee's understanding and application of the "sciences basic to the practice of medicine" and focuses on "principles and mechanisms underlying health, disease, and modes of therapy."¹⁹⁵ The second step of the examination is undertaken during the medical students' fourth year of studies.¹⁹⁶ This test measures the student's application of

189. AM. ASS'N OF MED. COLLS., *supra* note 27, at 7.

190. See *What Is USMLE?*, U.S. MED. LICENSING EXAMINATION, <http://www.usmle.org/> (last visited Jan. 10, 2013).

191. *Purpose of the USMLE*, U.S. MED. LICENSING EXAMINATION, <http://www.usmle.org/bulletin/overview/#purpose> (last visited Jan. 10, 2013) ("In the United States and its territories . . . the individual medical licensing authorities ("state medical boards") of the various jurisdictions grant a license to practice medicine. Each medical licensing authority sets its own rules and regulations and requires passing an examination that demonstrates qualification for licensure.")

192. *Id.* ("Results of the USMLE are reported to these authorities for use in granting the initial license to practice medicine.")

193. *What Is USMLE?*, *supra* note 190; see also *About the USMLE*, U.S. MED. LICENSING EXAMINATION, <http://www.usmle.org/about> (last visited Jan. 10, 2013); *Purpose of the USMLE*, *supra* note 191.

194. See AM. ASS'N OF MED. COLLS., *supra* note 27, at 7.

195. *The Three Steps of the USMLE*, U.S. MED. LICENSING EXAMINATION, <http://www.usmle.org/bulletin/overview/#threesteps> (last visited Jan. 10, 2013); see also AM. ASS'N OF MED. COLLS., *supra* note 27, at 7.

196. See AM. ASS'N OF MED. COLLS., *supra* note 27, at 7.

“medical knowledge, skills, and understanding of clinical science essential for the provision of patient care under supervision [and includes an] emphasis on health promotion and disease prevention.”¹⁹⁷ Of particular importance is the second step test’s emphasis on “basic patient-centered skills that provide the foundation for the safe and competent practice of medicine.”¹⁹⁸ The third step of the test is administered during the first years of the student’s residency.¹⁹⁹ This final test focuses on the “clinical science essential for the unsupervised practice of medicine” and is aimed at measuring the physician’s level of “independent responsibility for delivering general medical care.”²⁰⁰

The State Medical Board of California allows an American or Canadian medical student to apply for licensure after twelve months of continuous training in a single program and after they have passed Step 2.²⁰¹ However, the Board will not grant a license to the student until Step 3 is completed.²⁰² Moreover, California requires that the student obtain a passing score on step three within four attempts.²⁰³

In addition to testing requirements, jurisdictions require that the medical student engage in postgraduate training, known as a residency.²⁰⁴ Obtaining a residency is very competitive and its duration varies with the medical specialty involved.²⁰⁵ The Accreditation Council for Graduate Medical Education approves and regulates medical residency programs and also sets standards pertaining to “residents’ education experiences, duty hours, and safety.”²⁰⁶ The average duration of residencies lasts between three to five years and can extend further depending on the specialty.²⁰⁷

197. *The Three Steps of the USMLE*, *supra* note 195.

198. *Id.* (emphasis added).

199. AM. ASS’N OF MED. COLLS., *supra* note 27, at 7 (“A final step on clinical management is usually taken during the first or second year of residency.”).

200. *The Three Steps of the USMLE*, *supra* note 195.

201. *Application and Licensing for Physicians and Surgeons Frequently Asked Questions*, MED. BD. CAL., http://mbc.ca.gov/applicant/application_faq.pdf (last visited Jan. 10, 2013) (see “Do I have to take Step 3 before I can apply for licensure?”).

202. *Id.*

203. *Id.*

204. *See* AM. ASS’N OF MED. COLLS., *supra* note 27, at 9.

205. *See id.*

206. *Id.*

207. *Id.*

3. Accounting

Accounting is similar to law and medicine in that there is a national exam and variations exist across states. After an individual has completed the education requirements, as discussed above in “specialized education,” then he or she must complete the experience requirements in addition to completing the Uniform CPA exam.²⁰⁸ According to the AICPA, “most states . . . require at least two years of public accounting experience.”²⁰⁹ In California, for example, the applicant must provide the state board of accountancy with a signed Certificate of General Experience.²¹⁰

Completing and passing the Uniform CPA exam is required in every jurisdiction to obtain CPA licensure.²¹¹ Again, as with law and medicine, state boards issue the necessary licenses.²¹² According to the AICPA, the objective of the Uniform CPA Examination is to ensure that those applying for CPA licenses “possess the level of technical knowledge and the skills necessary for initial licensure in protection of the public interest.”²¹³

The Uniform CPA Exam consists of four sections: Auditing and Attestations, Business Environment and Concepts, Financial Accounting and Reporting, and Regulation.²¹⁴ It is important to note that the Regulation section includes testing on ethics and professional

208. AM. INST. CPAS, *supra* note 37.

209. *Id.*

210. CAL. BD. OF ACCOUNTANCY, *supra* note 40, at 17.

211. See *The Uniform CPA Examination: Purpose and Structure*, AM. INST. OF CPAS, <http://www.aicpa.org/BecomeACPA/CPAExam/ExamOverview/PurposeandStructure/Pages/default.aspx> (last visited Jan. 10, 2013) [hereinafter AICPA, *Purpose and Structure*] (“The Uniform Certified Public Accountant (CPA) Examination is the examination that an individual must pass in order to qualify for licensure as a Certified Public Accountant (CPA) in any of the 55 U.S. jurisdictions . . .”); see also *CPA Exam FAQ*, NAT’L ASS’N ST. BOARDS ACCOUNTANCY, <http://www.nasba.org/exams/cpaexam/examfaq> (last visited Jan. 10, 2013) (see “Eligibility Requirements”).

212. See AICPA, *Purpose and Structure*, *supra* note 211 (“CPA licenses are issued by state boards of accountancy . . . there is no national CPA licensure process in the U.S.”).

213. *Id.*

214. See *Uniform CPA Examination FAQs—General Information*, AM. INST. CPAS, http://www.aicpa.org/BecomeACPA/CPAExam/ForCandidates/FAQ/Pages/computer_faqs_1.aspx (last visited Jan. 11, 2013) [hereinafter AICPA, *General Information*] (see “What are the component parts of the Uniform CPA Examination?”).

responsibility.²¹⁵ Moreover, each section contains multiple-choice questions along with “task-based simulations”.²¹⁶ The AICPA describes the “task-based” simulations as “condensed case studies designed to test the knowledge and skills that are required of entry-level CPAs.”²¹⁷ More specifically, the “task-based” simulations sometimes involve “searching databases, completing written communication tasks, or working with spreadsheets and forms.”²¹⁸ Completing the four sections requires about fourteen hours of testing.²¹⁹ Examinees may take these sections in any order within a specific two-month “testing window” and most jurisdictions require the applicant to pass each section within an eighteen-month period.²²⁰

Most jurisdictions also have a requirement that the applicant take a separate ethics exam prior to obtaining licensure.²²¹ Although the exact type of ethics examination varies from state to state, many jurisdictions require that the applicant complete the AICPA Professional Ethics Exam.²²² California, however, requires that applicants take the Professional Ethics (PETH) exam.²²³ Like the AICPA test, the PETH exam is a self-study course and test.²²⁴

B. Discipline

All of these professions are self-regulated. In other words, complaints about professional misconduct are referred to agencies mostly comprised of members of the profession. This section examines discipline in the law, medicine, and accounting.

215. See *Uniform CPA Examination FAQs—Content, Structure, and Delivery*, AM. INST. CPAS, http://www.aicpa.org/BecomeACPA/CPAExam/ForCandidates/FAQ/Pages/computer_faqs_2.aspx (last visited Jan. 11, 2013) (see “What content areas are covered in each Examination section?”).

216. *Id.* (see “What types of questions are included on the Examination?”).

217. *Id.* (see “What are task-based simulations?”).

218. *Id.*

219. See AICPA, *Purpose and Structure*, *supra* note 211 (“These four sections representation a total of 14 hours of testing.”).

220. See AICPA, *General Information*, *supra* note 214 (see “When is the Uniform CPA Examination administered?” and “Is there a time limit for passing the four Examination sections?”).

221. See *Exam & Licensure Requirements*, THIS WAY TO CPA, <http://www.thiswaytocpa.com/exam-licensure/state-requirements/> (last visited Jan. 11, 2013) (see each individual state listing for details).

222. See *id.*

223. See *Frequently Asked Questions: Initial Licensing*, CAL. BD. ACCOUNTANCY, <http://www.dca.ca.gov/cba/faqs/faqlic.shtml> (last visited Jan. 11, 2013) (see “Which ethics examination is acceptable for initial licensure?”).

224. See *id.*

1. Law

The states regulate lawyers mostly through their individual high courts or State Bar Associations. Most of the states have adopted some form of the Model Rules of Professional Conduct promulgated by the ABA. ABA Model Rule 8.3—Reporting Professional Misconduct²²⁵—requires the reporting of any lawyer who has violated one of the Rules of Professional Conduct in a way that raises a substantial issue about the lawyer’s fitness to practice. California does not require reporting of other lawyers but does require lawyers to self-report.²²⁶

2. Medicine

Each state has a Medical Board, which is a state government agency that licenses and disciplines doctors.²²⁷ In California, the Medical Board is part of the Department of Consumer Affairs and it functions to (1) provide public-record information to consumers regarding California-licensed physicians, and (2) to investigate complaints levied against physicians.²²⁸ Physicians are required to report themselves in many instances and others are required to report problems as well. The types of issues that require mandatory reporting include deaths, convictions and legal settlements or awards.²²⁹ The public may file complaints against physicians with the California Medical Board.²³⁰

However, it is interesting to note that complaints pertaining to “[e]thical matters that do not violate any law” fall outside of the Board’s jurisdiction and are referred to county medical societies.²³¹ The Board will only investigate complaints alleging a violation of the Medical Practice Act.²³²

225. See MODEL RULES OF PROF’L CONDUCT R. 8.3 (2012).

226. See Evan A. Jenness, Commentary, *No Duty to Rat in California*, 25 COUNTY B. UPDATE (Aug. 2005), available at <http://www.lacba.org/showpage.cfm?pageid=5667>.

227. See *supra* note 191 and accompanying text.

228. See *Role of the Medical Board of California*, MED. BD. CAL., <http://www.mbc.ca.gov/board/role.html> (last visited Jan. 11, 2013).

229. See MED. BD. OF CAL., *supra* note 68, at 19; see also CAL. BUS. & PROF. CODE §§ 801.01, 802.1, 802.5, 803.5, 803.6, 805, 2240(A) (West 2012).

230. See MED. BD. OF CAL., *supra* note 68, at 23; see also CAL. BUS. & PROF. CODE § 800(B).

231. MED. BD. OF CAL., *supra* note 68, at 23.

232. *Id.* at 24.

Section 2227 of the California Business and Professions Code discusses the disciplinary process in that state.²³³ The Medical Board of California's Guide to the Laws Governing the Practice of Medicine states that discipline may take the following forms: license revocation, license suspension (for a period not to exceed one year), putting a license on probation or restrictions, "[i]ssuing a public reprimand" and "[i]mposing as part of probation additional requirements such as undergoing psychiatric treatment, obtaining additional clinical training or education, or practicing under supervision."²³⁴

The Guide also states that pursuant to California Business and Professions Code section 2292, "[t]he Board has the legal authority to compel a physician, who is suspected of not being able to practice medicine with reasonable skill, and safety to patients, to take an oral competency examination" if it finds there is "reasonable cause to doubt the physician's competence to practice."²³⁵

3. *Accounting*

The CBA has an Enforcement Division that initiates and investigates complaints.²³⁶ According to the CBA's website, it has the "statutory authority to discipline its registrants and licensees for violations of the Accountancy Act which may include: [n]egligence or incompetence; [f]raud, deceit and misrepresentation in the professional practice; [f]raud or deceit in obtaining a license; [a]iding and abetting unlicensed practice or any other violation of the CBA's laws and regulations; and [c]onviction of a crime substantially related to the duties and functions of Certified Public Accountants."²³⁷

The CBA's *Manual of Disciplinary Guidelines and Model Disciplinary Orders* provide that discipline can include many of the

233. *Id.* at 24, 28.

234. *Id.* at 28; *see also* CAL. BUS. & PROF. CODE § 2233.

235. MED. BD. OF CAL., *supra* note 68, at 29.

236. *See Filing a Complaint with the California Board of Accountancy*, CAL. BD. OF ACCOUNTANCY, <http://www.dca.ca.gov/cba/consumers/complain.shtml> (last visited Jan. 11, 2013).

237. *Id.*

same actions taken under the law and medicine schemes.²³⁸ The CBA also publishes all disciplinary actions and decisions on its website.²³⁹

VI. CONTINUING EDUCATION REQUIREMENTS

A. Law

In California, licensed attorneys are required to complete twenty-five hours of Continuing Legal Education (CLE) within a three-year reporting period.²⁴⁰ Four hours must be dedicated to ethics, one hour must involve the “elimination of bias in the profession,” and another hour must be dedicated to education involving “substance abuse or mental illness” and its relationship to professional competence.²⁴¹

B. Medicine

A majority of states require that doctors complete some form of continuing medical education (CME).²⁴² Moreover, some states require that a portion of the CME involved “selected topics such as risk reduction, pain control, or human sexuality.”²⁴³ CME programs must be accredited and reviewed by the Accreditation Council for Continuing Medical Education.²⁴⁴

In California, for example, physicians are required to complete “an average of 50 hours” of CME within two years prior to license expiration.²⁴⁵ Additionally, pursuant to California Business and Professions Code section 2190.5, a physician “must complete a mandatory, one-time requirement of 12 hours continuing education in pain management and the treatment of terminally ill and dying

238. See CAL. BD. OF ACCOUNTANCY, A MANUAL OF DISCIPLINARY GUIDELINES AND MODEL DISCIPLINARY ORDERS 1 (7th ed. 2011), available at <http://www.dca.ca.gov/cba/publications/dispman.pdf> (explaining that discipline can include revocation of license, probation, suspension, restricted practice, ethics continuing education, regulatory review court, and continuing education courses).

239. See *Pending Accusations Index*, CA. BD. OF ACCOUNTANCY <http://www.dca.ca.gov/cba/discipline/accus.shtml> (last visited Jan. 18, 2013).

240. *MCLE Requirements*, A.B.A., http://www.americanbar.org/publications_cle/mandatory_cle/mcle_states/states_a-k/california.html (last visited Jan. 11, 2013).

241. *Id.*

242. ASS'N OF AM. MED. COLLS., *supra* note 27, at 13 (“The majority of states require documented, formal participation in accredited continuing medical education activities.”).

243. *Id.*

244. *Id.*

245. MED. BD. OF CAL., *supra* note 68, at 13.

patients.”²⁴⁶ In order to regulate the CME requirement, the Board randomly audits physicians stating they are in compliance.²⁴⁷

C. Accounting

All states require that licensed accountants participate in continuing professional education.²⁴⁸ The AICPA and the National Association of State Boards of Accountancy issued a statement on the Standards for Continuing Professional Education and stated therein that “[c]ontinuing professional education is required for CPAs to maintain their professional competence and provide quality professional services.”²⁴⁹ Moreover, the AICPA requires that its members complete 120 hours of CPE every three-year reporting period.²⁵⁰ California requires that CPAs complete eighty hours in a two-year period between license renewals.²⁵¹

At least twenty of those eighty hours must be completed in each of the two years preceding license expiration, including twelve hours of education in technical subject matter.²⁵² An applicant for license renewal must also complete four hours of ethics education and a two-hour Board-approved Regulatory Review course if more than six years have lapsed since last completing a Board-approved Regulatory Review or PC&E course.²⁵³

VII. DUTIES TO THE PUBLIC

Each of these professions recognizes that their members have duties that extend to the general public, not just to their clients or

246. *Id.*

247. *Id.* at 14.

248. AM. INST. OF CPAS, CPE REQUIREMENTS 1–9 (2009), *available at* <http://www.aicpa.org/Advocacy/State/DownloadableDocuments/CPERequirementsChart.pdf>.

249. AM. INST. OF CPAS & NAT’L ASS’N OF ST. BDS. OF ACCOUNTANCY, STATEMENT ON STANDARDS FOR CONTINUING PROFESSIONAL EDUCATION (CPE) PROGRAMS i (2011), *available at* <http://www.aicpa.org/Advocacy/State/DownloadableDocuments/AICPA-NASBA-Final-CPE-Standards.pdf>.

250. *AICPA Membership CPE Requirements Q & A*, AM. INST. CPAS, <http://www.aicpa.org/Membership/Requirements/CPE/Pages/default.aspx> (last visited Jan. 11, 2013) (“From January 1, 2001, forward and for each three-year reporting period thereafter, all AICPA members shall complete 120 hours or its equivalent, of continuing professional education.”).

251. CAL. BD. OF ACCOUNTANCY, *supra* note 40, at 11.

252. *Continuing Education Quick Reference Guide*, CAL. BD. OF ACCOUNTANCY, http://www.dca.ca.gov/cba/cont_educ/cequickref.shtml (last updated Jan. 25, 2012).

253. *Id.*

patients. This section will examine the emphasis placed on these duties in each of the three professions.

A. Law

The Preamble to the ABA Model Rules states:

A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a *public citizen having special responsibility for the quality of justice* As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession.²⁵⁴

As part of the criminal justice system, prosecutors have the “responsibility of a minister of justice and not simply that of an advocate.”²⁵⁵ Thus, prosecutors must disclose any evidence that would “create[] a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted”²⁵⁶

ABA Model Rule 6.1 states: “Every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should aspire to render at least (50) hours of pro bono publico legal services per year.”²⁵⁷ While providing pro bono services is not mandatory, lawyers usually cannot avoid representing a client when appointed by a court. ABA Model Rule 6.2 states: “A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause”²⁵⁸ Such good cause exists if representation of the client would result in violation of the Rules of Professional Conduct or other law, unreasonable financial burden on the lawyer, or if the “client or the cause is so repugnant to the lawyer” that effective representation would not be possible.²⁵⁹ In California, lawyers have a duty “[n]ever to reject, for any consideration personal to himself or herself, the cause of the defenseless or the oppressed.”²⁶⁰ Furthermore, ABA Model Rule 8.3 requires lawyers to report other lawyers who have violated applicable rules of professional conduct

254. MODEL RULES OF PROF'L CONDUCT Preamble & Scope (2012) (emphasis added).

255. *Id.* R. 3.8 cmt. 1.

256. *Id.* R. 3.8(g).

257. *Id.* R. 6.1.

258. *Id.* R. 6.2.

259. *Id.*

260. CAL. BUS. & PROF. CODE § 6068(h) (West 2012).

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and judges who have violated applicable rules of judicial conduct to the appropriate authorities.²⁶¹

B. Medicine

The ACP Ethics Manual states that “[p]hysicians have obligations to society that in many ways parallel their obligations to individual patients. . . . Physicians should protect public health by reporting disease, injury, domestic violence, abuse, or neglect to the responsible authority as required by law.”²⁶² Every state has some sort of “mandated reporter” law in which a specified group of persons is required to report certain incidents to the appropriate authorities. In California, physicians are included in the extensive list of mandated reporters in the Child Abuse and Neglect Reporting Act²⁶³ who must report cases of sexual assault²⁶⁴ and neglect²⁶⁵ of children to the appropriate authorities.

The AMA Code of Medical Ethics advises that physicians should familiarize themselves with the reporting requirements in their state and comply with the laws.²⁶⁶ However, the Code also advises that the physician should reveal only what is necessary to protect the patient’s privacy and that “if available evidence suggests that mandatory reporting requirements are not in the best interests of patients, physicians should advocate for changes in such laws.”²⁶⁷

In addition to the reporting of child abuse and neglect, states have enacted laws that require reporting cases of communicable diseases. In California, physicians visiting any place or structure housing anyone with a contagious, infectious, or communicable disease must report that fact to the local health authorities, along with the name of the individual, if known, where the individual is confined, and the nature of the disease.²⁶⁸

261. MODEL RULES OF PROF’L CONDUCT R. 8.3 (2012).

262. ACP ETHICS MANUAL, *supra* note 75.

263. CAL. PENAL CODE § 11165.7(a)(21) (West 2012).

264. *Id.* § 11165.1.

265. *Id.* § 11165.2

266. AM. MED. ASS’N CODE OF ETHICS, Op. 2.02(3)(b) (2008), *available at* <http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion202.page?>.

267. *Id.*

268. CAL. HEALTH & SAFETY. CODE §§ 120175–120250 (West 2012).

All fifty states also have laws requiring physicians to report newly diagnosed cases of AIDS to local or state health departments.²⁶⁹ HIV reporting requirements differ among the states from name-based reporting, code-based reporting, and name-to-code-based reporting.²⁷⁰ State laws also differ as to whether physicians must notify “contacts,” third parties who may have been exposed to the HIV through a patient.²⁷¹ Some states mandate that disclosure must be made to the health department of any contacts known by the physician if the patient refuses to disclose to the contact, while other states mandate a duty to warn directly to third parties who may be at risk of exposure through patients.²⁷²

AMA Code of Ethics Opinion 2.23(5) states that:

Physicians must honor their obligation to promote the public’s health by working to prevent HIV-positive individuals from infecting third parties within the constraints of the law. If an HIV-positive individual poses a significant threat of infecting an identifiable third party, the physician should: (a) notify the public health authorities, if required by law; (b) attempt to persuade the infected patient to cease endangering the third party; and (c) if permitted by state law, notify the endangered third party without revealing the identity of the source person.²⁷³

Physicians who themselves have an infectious disease must refrain from activities that would create a significant risk to the patient if he or she contracted the disease.²⁷⁴ Although physicians may face liability for failing to warn third parties of foreseeable harm, the courts have declined to create an affirmative duty to notify third parties of the risk of HIV.²⁷⁵ Physicians also have other affirmative

269. Laura Lin & Bryan A. Liang, *HIV and Health Law: Striking the Balance Between Legal Mandates and Medical Ethics*, 7 VIRTUAL MENTOR: ETHICS J. AM. MED. ASS’N (Oct. 2005), available at <http://virtualmentor.ama-assn.org/2005/10/hlaw1-0510.html>.

270. *Id.*

271. *Id.*

272. *Id.*

273. AM. MED. ASS’N CODE OF ETHICS, Op. 2.23 (2010), available at <http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion223.page?>.

274. AM. MED. ASS’N CODE OF ETHICS, Op. 9.13 (1999), available at <http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion913.page>; AM. MED. ASS’N CODE OF ETHICS, Op. 9.131 (1998), available at <http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion9131.page>.

275. Lin & Liang, *supra* note 269.

duties to protect public health. These include the obligation to provide urgent medical care during disasters such as epidemics and terrorist attacks,²⁷⁶ reporting adverse reactions to a drug or medical device to the broader medical community or the Federal Drug Administration,²⁷⁷ and reporting impaired and/or incompetent colleagues.²⁷⁸

C. Accounting

The AICPA Code of Professional Conduct states that “[m]embers should accept the obligation to act in a way that will serve the public interest, honor the public trust, and demonstrate commitment to professionalism.”²⁷⁹ However, under the AICPA code the duties a CPA owes depend on the type of work to be performed. When a CPA provides attested services, he or she owes a duty to the public.²⁸⁰ Attested services involve providing a report or assertion on subject matter that is the responsibility of another party, including auditing and reviewing financial statements.²⁸¹ However when a CPA is only providing his or her findings, conclusions, or recommendations he or she is undertaking consulting services and owes a duty only to the client for whom the services are being performed.²⁸²

If the CPA breaches his or her duty to the public, an injured party may be able to sue to recover damages.²⁸³ Section 10(b) of the Securities and Exchange Act provides an implied civil remedy for persons who incur damages as a result of fraud in connection with a purchase or sale of securities.²⁸⁴ Over the past four decades, thousands of cases asserted against accountants have been based on

276. AM. MED. ASS'N CODE OF ETHICS, Op. 9.067 (2004), *available at* <http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion9067.page>.

277. AM. MED. ASS'N CODE OF ETHICS, Op. 9.032 (1994), *available at* <http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion9032.page>.

278. AM. MED. ASS'N CODE OF ETHICS, Op. 9.031 (2003), *available at* <http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion9031.page>.

279. AM. INST. OF CPAS CODE OF PROF'L CONDUCT § ET 53—Article II: The Public Interest (1998), *available at* http://www.aicpa.org/Research/Standards/CodeofConduct/Pages/et_section_53__article_ii_the_public_interest.aspx.

280. Fleming & Molenda, *supra* note 105, at 984.

281. *Id.*

282. *Id.*

283. 1 C.J.S. *Accountants* § 15 (2012).

284. *See* 17 C.F.R. § 240.10b-1 (2012).

this provision and on Rule 10b-5, which the Securities and Exchange Commission promulgated under Section 10(b).²⁸⁵ The gradual elimination of the privity doctrine has increased the scope of people who may sue for damages. Most states now have a version of section 552 of the Restatement 2nd of Torts, “which permits any person whose reliance upon the accountant’s report was specifically foreseen by the accountant to assert a claim against the accountant in negligence.”²⁸⁶ Some states have gone even further, permitting any person whose reliance upon the accountant’s report was reasonably foreseeable to assert a negligence claim.²⁸⁷

In light of the accounting scandals of the last decade the CPA community has focused on mending the public’s trust in accountants and public auditors specifically. The CBA states that its mission is “[t]o protect consumers by ensuring only qualified licensees practice public accountancy in accordance with established professional standards.”²⁸⁸ The CBA’s vision is that “[a]ll consumers are well informed and receive quality accounting services from licensees they can trust.”²⁸⁹ To this end the CBA provides consumer education through its website and publications. The CBA provides recommendations on how to select a CPA, how to verify a CPA license, what to do when first meeting a CPA, and how to file a complaint against a CPA.²⁹⁰

California has also enacted a system of peer review, which is required for all California-licensed firms.²⁹¹ A peer review consists of an unaffiliated CPA studying a firm’s accounting and auditing work.²⁹² Peer reviews provide firms an opportunity to learn best-practice techniques and improve services to consumers.²⁹³ California also provides each licensed CPA with a wall certificate to increase the

285. DAN L. GOLDWASSER, M. THOMAS ARNOLD, & JOHN H. EICKEMEYER, PRAC. L. INST., *Federal Securities Law Claims*, in ACCOUNTANTS’ LIABILITY §1:4.6 (2011).

286. DAN L. GOLDWASSER, M. THOMAS ARNOLD, & JOHN H. EICKEMEYER, PRAC. L. INST., *Negligence Claims*, in ACCOUNTANTS’ LIABILITY §1:4.1 (2011).

287. *See, e.g.*, *Bily v. Arthur Young & Co.*, 834 P.2d 745, 783-84 (Cal. 1992); *Citizens State Bank v. Timm, Schmidt & Co., S.C.*, 335 N.W.2d 361, 386-87 (Wis. 1983).

288. CAL. BD. ACCOUNTANCY, <http://www.dca.ca.gov/cba> (last visited Jan. 11, 2013).

289. *Id.*

290. *See generally* CAL. BD. OF ACCOUNTANCY, CONSUMER ASSISTANCE BOOKLET, *available at* <http://www.dca.ca.gov/cba/publications/pamphlet.pdf>.

291. *Id.* at 4.

292. *Id.*

293. *Id.*

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public's trust for CPAs by allowing qualified CPAs to display their license.²⁹⁴

CONCLUSION

This Article reveals that each of these professions—law, medicine, and accounting—has common characteristics that help to illuminate what we mean when we talk about a profession. Each profession provides a service that requires specialized education and the exercise of independent judgment. They all have substantial expertise that reveals the disparities in the information available to the professional and the client, and therefore the client's ability to trust the professional is essential. Each requires its professionals to put someone else's interests ahead of their own and therefore requires an ethos different from business's standard profit maximization norm. Such an ethos supports internalized codes of conduct and occupational self-regulation. Finally, they all have duties to the public in addition to duties to their individual clients.

These three professions have much in common. Although some have argued that calling something a profession really does not have any added value, I disagree. As we can see by the comparisons throughout this Article, the common themes of expertise, trust, and duties to the public do set these professions apart from the average occupation. As clients or patients, we expect that our professional service providers will put our interests above their own and use their best independent judgment to assist us, even while recognizing that they may have duties to the public as well. We do not necessarily have the same expectation that a shoe salesman will put their own interests in making a high commission aside when helping us find the right pair of shoes.

Julius Henry Cohen wrote his book *The Law: Business or Profession?* at the beginning of this debate when it was important for many reasons to have lawyers viewed as professionals. Even one hundred years later, professionals still have an important role to play in our society.

294. See CAL. BD. ACCOUNTANCY, *supra* note 223.